[2022] PBRA 15

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Application for Reconsideration by Smith

Application

1. This is an application by Smith (the Applicant) for reconsideration of a decision of an oral hearing dated the 22 September 2021. The decision of that panel was not to direct release, and to indicate that the Applicant remained suitable for open conditions.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are:

   - A handwritten two-page letter from the Applicant dated 30 September 2021, apparently sent by recorded delivery. It stated that it enclosed a 13-page reconsideration application letter however it is not clear when this 13-page letter was received (see below);
   - 13-page reconsideration letter, undated, handwritten by the Applicant to an officer at the prison where the Applicant is based. I am satisfied this is the 13-page letter referred to above;
   - Letter from the Parole Board dated 24 November 2021, stating that the 21-day window is over, as decision dated 22 September, but no application was received until or after the 28 October 2021;
   - Letter from the Applicant to the Parole Board responding to the Parole Board's letter referring to the letter dated 30 September 2021 above. **It was subsequently agreed that the Applicant's application was therefore received on time;**
   - A 4-page letter from the Applicant to the Parole Board dated 24 October 2021. This letter indicates that further to taking legal advice (but being unable to get legal aid for the reconsideration application itself), he is seeking to clarify the grounds for reconsideration. I am satisfied that this letter provides no new grounds and therefore have accepted the contents of this letter for my consideration, along with the 13-page substantive letter listed above.
   - The dossier in the case; and
   - The decision letter dated 22 September 2021.

Background

4. The Applicant is serving a life sentence for offences of rape of a female under 13 and kidnap. He was 49 years old at the time of the offence and is currently 64 years old. His minimum tariff was set at 6 years, 9 months and 13 days, and this tariff

expired in October 2013. This is the sixth review of his case. At the time of the hearing, he was in open conditions.

Request for Reconsideration

5. The application for reconsideration is dated 30 September 2021.

6. The grounds for seeking a reconsideration are as follows:

   (a) Irrationality
   - The panel ignored the release recommendations from the professionals.
   - The panel could have adjourned for a more robust release plan to be produced by the Community Offender Manager (COM).
   - The panel erred in their approach to making the decision by misunderstanding the Applicant's mental health and personality.

Current parole review

7. This review has had a number of adjournments. The referral is dated January 2019. There was one deferral at Member Case Assessment for further information. Following receipt of this the case was directed to an oral hearing in December 2019. There have been at least 7 adjournments for a variety of reasons, some have been detailed below in my discussion. The final adjournment was brief and after the hearing, directing further information. Following receipt of the further information the panel concluded the decision on the papers.

8. The oral hearing was on 14 June 2021, in front of a 3-member panel of the Parole Board that included two independent members and a psychologist member. The evidence considered by the panel included the dossier of 735 pages and oral evidence from a prison psychologist and the Applicant's Community and Prison Offender Managers.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 22 September 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions. These are in any event part of a template.

Parole Board Rules 2019

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Irrationality

11. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

    "the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

12. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

13. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Other

14. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

15. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

16. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be

examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The Reply on behalf of the Secretary of State

17. On 24 January 2022 the Secretary of State indicated that they would be making no submissions in relation to the Application.

Discussion

18. The Applicant's 13-page letter is very detailed and the grounds for reconsideration stated in paragraph 6a) above is my assessment of the grounds raised in the letter. The 4-page letter also referred to above that followed the 13-page letter assisted me in clarifying the third and final bullet point of paragraph 6a). The rest of the 13-page letter provide details that support these grounds, as well as some material that I do not consider to be relevant to the Application. This irrelevant material includes for example the Applicant's statements on how he has engaged with the prison regime. This is because the reconsideration process is not a review of all the evidence but a consideration of whether the decision that was made was lawful.

19. Inevitably, the three grounds are linked and there will be some repetition in my findings.

20. Turning then to the first ground under the first bullet point above, I make these more general points first:

21. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

22. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710.**

23. In this case, the panel heard from a forensic psychologist who works for Her Majesty's Prison and Probation Service (HMPPS); the Prison Offender Manager and the Community Offender Manager. I consider that the panel has carefully considered the evidence of each witness and has provided a wealth of detail in relation to that evidence. The psychologist and the Prison Offender Manager recommended release, the Community Offender Manager did not.

24. The panel lists all the salient features pertaining to the psychologist's recommendation, in particular the fact that their recommendation had changed from a position of no release in their report, to release at the hearing. The letter explains why this change came about. The main reason, as explained by the decision, was because the psychologist became satisfied, during the course of the hearing, that the risk management plan was now sufficiently robust to manage the Applicant's risk.

25. The panel in my opinion treated all the points in favour of the Applicant's release fairly when it took into account the psychologist's recommendation. They disagreed with it, and gave a full explanation as to why they did so. They considered that the risk management plan as presented at the hearing was not robust enough. They put the points to the psychologist and considered the responses. For example, the panel stated its concerns about the relatively short period of time that a placement would be available at an Approved Premises (AP); stating that in their opinion this was insufficient time for the Applicant's particular needs, long custodial journey and lack of evidence of recent overnight temporary leaves. Also, for example, the panel was concerned about the lack of a structured move-on plan. The panel disagreed with the witness that the plan was sufficiently planned to manage risk, and they were correctly looking beyond the short period at the Approved Premises. In my opinion a thorough explanation was given for disagreeing with this recommendation and there is no irrationality in the panel's approach to its decision with respect to this witness.

26. The panel next explored the recommendation of the Prison Offender Manager. Once again, the evidence provided at the hearing was impressively detailed in the decision letter and the panel's own assessment of the evidence clearly provided. Again, points in favour of the Applicant were listed and the Applicant given credit where the panel considered it to be due.

27. The panel also explained its reasons for disagreeing with this witness, including for example the assessment of the witness that the Applicant would be able to manage stress in the community. The panel explained its own findings that there was insufficient (my word) evidence that the Applicant would be able to manage stressors that were different in the community as compared with those in a custodial setting. A thorough explanation was given for disagreeing with this recommendation and there is no irrationality in the panel's approach to its decision with respect to this witness.

28. I now turn to the complaint that the panel should have adjourned for a more robust risk management plan to be put in place.

29. This review was a much delayed one, not always just because of the risk management plan, but I note as the Applicant states that the panel chair had on several occasions directed the COM to further develop the risk management plan. As far back as in October 2020 the directed information requests an explanation as to why the Approved Premises stay would be as short as it was, given that it was a specialist placement and those are usually for a longer period. The directions also asked for details of move-on accommodation and many other questions relevant to a future release plan. In December 2020, in an adjournment notice, many of the same points were made in further directions to the COM. Indeed, I notice 9 separate

parts to the direction for more information to the risk management plan. More directions, focusing on release accommodation, were made in February 2021. In June 2021, in another adjournment notice, yet further directions were made for the COM regarding the risk management plan. In July 2021 the case was adjourned yet again and further information was directed from the COM regarding the risk management plan.

30. In my opinion, the panel has left no stone unturned in its attempt to ensure it had the information it needed by the time it was ready to make a decision. It would have been lawful for the panel to accept the information it had originally been provided on the risk management or release plan and proceed on that basis, but it did not, I see this as making every effort to be fair to the Applicant.

31. The decision of the panel in relation to the evidence of the Community Offender Manager by the time of the hearing is clearly stated in the decision. It found that the risk management plan available to it was not capable of managing the Applicant's risk. The decision letter indicates that the COM was questioned fully about elements of the plan, for example the length of stay at the recommended AP, what move on plan there was if any (there was not), concerns about the lack of plan for structured risk focused interventions in the community, that there was no information about the personal support that the Applicant had stated was available to him, and also concerns about access to mental health services at the point of release.

32. These are just a few examples of the detailed exploration of the release plan. The panel even adjourned for a short period after the hearing to direct further information before it made its final decision. The decision is very clear in explaining that the panel assessed that the plan was simply not capable of managing the complex needs of the Applicant, given his offending history and long period of time in custody.

33. The Applicant submits that the panel should have adjourned (again) for the COM to do more work on the risk management plan. This, in my judgement, is simply unrealistic. The panel was impressively diligent in attempting to ensure that there was a robust plan in place. There is no evidence that yet another adjournment would have elicited any further positive developments, and it is not the duty of the Parole Board to drive the rehabilitation and resettlement plans for a prisoner. The Applicant states, understandably, how stressful all the adjournments and delays were during the course of this review and in my view it was appropriate and fair for the panel to make its decision when it did.

34. I turn finally to the last point. The Applicant suggests that the panel erred in that it misunderstood his mental health issues, if any. The Application suggests that the decision of the panel was made on the grounds that they were under the impression that he was 'under mental health' (I assume that means mental health treatment) and had a personality disorder, and that was not the case because he had not been assessed as having a personality disorder.

35. There are two parts to this complaint. Firstly, whether there was such an error made and secondly, if the error was made, whether the panel's decision was in any way influenced by this error. If an error was made, it does not in itself indicate that the

final decision of the panel was irrational. Errors in facts in themselves, while regrettable, do not automatically render a decision unsafe. There has to be evidence that the error made a substantive difference to the decision of the panel.

36. The decision letter refers to concerns about the Applicant's mental health. These appear to be well evidenced from the information in the dossier and evidence provided at the hearing, and there is nothing in the decision letter that indicates that the Applicant's mental health was such that it provided any barrier to release, although the decision letter stated that appropriate mental health support from the point of release must be included in any release plan.

37. The decision letter makes no reference at all to the Applicant having a personality disorder. It is correct (as the Application states) that the acronym PERS is wrongly explained in the decision letter as the 'Personality Enhanced Resettlement Service'. PERS is in fact the Pathways Enhanced Resettlement Service. The dossier has an explanatory note which explains this service, which the Applicant was engaging with at the time of the hearing. The Service describes itself in the introduction of its note as having the aim to support prisoners in open prisons who are likely to have difficulty in managing the transition from closed to open conditions. It goes on to state that prisoners who are eligible for access to this service do not need to have a personality disorder but do need to be 'screened' into the wider Personality Disorder Pathway or OPD service. This is a service within the criminal justice system, resourced by public funds and that has a wide reach in custody and in the community. The services it provides support prisoners in a variety of ways that include one to one meetings with professionals including psychologists and access to risk focused interventions and therapeutic and counselling services where it is considered to be required. The Applicant had been screened into this service. Being screened does not mean that a prisoner has a personality disorder, however the screen indicates that there are personality traits that might lead to issues for progression for a prisoner, and that prisoner might need further support.

38. I accept that the decision letter contained what is essence a typographical error. I cannot see how that error led the panel to a finding that a diagnosis of personality disorder had been made. Neither do I see any reliance on the 'screen' into the OPD pathway being a significant or even limited part of the reason not to release the Applicant. I accept that the word 'complex' has been used by the panel in its assessment of the Applicant's need for robust management of risk, but that assessment is wholly substantiated by the evidence in the dossier and as reported in the decision letter, in the evidence before it on the day of the hearing.

39. On that final ground therefore, I find no error in the panel's understanding of the Applicant.

Decision

40. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Chitra Karve
01 February 2022